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IN THE

Supreme Court of the United States

October Term, 1955

No. 226

M. W. Kaye, Administrator, with the Will Annexed of the Estate of Morris Schuman, Deceased,
Petitioner,

v.

Louise Wells Brueggeman, Lois Wells Robinson, Lavon Wells Wuttermeister, and Dayton O.C. Company, a corporation, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

M. W. KAYE, Administrator, with the Will Annexed of the Estate of Morris Schuman, Deceased,
Petitioner,

v.

LOUISE WELLS BECHLER, LOIS WELLS ROBINSON, LAVON WELLS WINTERRINGER, and DAVON OIL COMPANY, a corporation, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, M. W. Kaye, Administrator, with the Will Annexed of the Estate of Morris Schuman, Deceased, prays that a writ of certiorari issue to review

the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the District Court (T. 22-23)[1] is printed as Appendix A, *infra*. The opinion of the Court of Appeals for the Tenth Circuit reversing the judgment of the District Court, printed as Appendix B, *infra*, has not yet been reported. The opinion of the Court of Appeals for the Tenth Circuit denying the petition for rehearing, printed as Appendix C, *infra*, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 21, 1955. Rehearing was denied on April 13, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Where defendants (Respondents) failed to plead laches as required by Rule 8(c), Federal Rules of Civil Procedure, and raised the defense of laches for the first time on appeal, may a Court of Appeals reverse a District Court's judgment for the plaintiff (Petitioner) on the ground that the action was barred by laches?

2. Morris Schuman (of whose Estate Petitioner is Administrator) and Charles E. Wells (of whom

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[1] This Petition makes reference to the Transcript of Record in the District Court and to the Appendix to this Petition. References to the Transcript of Record are designated by "T." preceding the page number. References to the Appendix to this Petition are designated by "App." preceding the page number.

Respondents[2] are the heirs) entered into a joint venture for the purchase and sale of real property in which each was to have an undivided one-half interest and was to share equally in the profits. Wells caused title to certain of the property acquired by the joint venture to be placed in his name without the knowledge of Schuman and contrary to the terms of their agreement.

The question presented is whether the Court of Appeals reached a decision contrary to the law of Oklahoma in determining that a cause of action to recover Schuman's interest in the property accrued upon the death of Wells, so as to commence the running of the period of limitations at such date, where Schuman did not have knowledge to the time of his death of Wells' action and where Petitioner did not have knowledge of any repudiation of the trust until several years later.

STATUTES AND RULES INVOLVED

Rule 8(c), Federal Rules of Civil Procedure, provides as follows:

> "(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counter-

[2] Respondent, Davon Oil Company, is assignee of an oil and gas lease, on certain of the real property in question, made to one C. H. LaFever by Wells on March 20, 1946.

> claim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

Rule 12(h), Federal Rules of Civil Procedure, provides as follows:

> "(h) WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received."

Rule 52(a), Federal Rules of Civil Procedure, provides in part as follows:

> "(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

The relevant Oklahoma statutes of limitations are set out in Appendix D, *infra*.

STATEMENT

Jurisdiction of the District Court was based upon diversity of citizenship: the plaintiff was a citizen of Arkansas, the individual defendants were citizens of Oklahoma; and the defendant Davon Oil Company was an Oklahoma corporation. The matter in controversy, exclusive of interest and costs, exceeded the sum of three thousand dollars (T. 2).

Morris Schuman and Charles E. Wells entered into a joint venture in 1939 for the acquisition, holding, selling, leasing, renting and disposing of real property (T. 3). Wells was Schuman's attorney (T. 82) and the closest relationship of mutual confidence existed between them (T. 68, 69). Although their written agreement could not be produced, parol evidence was introduced establishing the existence and nature of the agreement (T. 22). The trial court specifically found that there was a written partnership agreement (T. 22), and the Court of Appeals also noted that the agreement was in writing (App. 9). Under the agreement, Wells was to advance the necessary funds and Schuman was to contribute his experience, ability, and services (T. 36). Each was to have an undivided one-half interest in any property acquired and all profits derived, after money advanced by Wells was repaid (T. 37). Title to property acquired by the joint venture was to be placed in the name of Schuman's son, J. J. Schuman, who was to act as trustee for the joint venture (T. 22). On January 21, 1941, Morris Schuman and J. J. Schuman signed a note in favor of Wells for advances made to that date, as partial security for which Morris Schuman pledged a diamond ring (T. 22, 34).

In 1941, J. J. Schuman executed and delivered to Wells blank deeds for the purpose of facilitating the sale and transfer of property owned by Morris Schuman and Wells and held in the name of J. J. Schuman (T. 67, 123, 124, 165). Subsequently, Wells used one of these blank deeds, dated July 19, 1941, to convey certain of the partnership property to himself for the purpose of protecting himself because of the illness of both Morris Schuman and J. J. Schuman (T. 66, 67, 68, 69, 124). The District Court found that neither Morris nor J. J. Schuman was aware that this property had been taken out of the name of J. J. Schuman and placed in the name of Wells (T. 22). Thereafter, Morris Schuman and Wells both continued to regard the property as owned by the joint venture, and considerable evidence was submitted to the trial court substantiating this (T. 242, 243, 244, 246, 247, 248, 250, 251, 252, 253, 254, 256, 260, 261, 262, 263, 264). The books and records of the partnership were at all times held in Wells' office, and Wells' bookkeeping with respect to the property included in the July 19 deed continued as before, and he continued to submit reports on the property to Morris Schuman (T. 51, 52, 127).

Wells died testate on July 14, 1946, and property included in the deed of July 19, 1941, passed to Respondents under his will (T. 22). The trial court found that Morris Schuman believed, both before and after the death of Wells, that all of the property of the joint venture was held in the name of J. J. Schuman (T. 22). After the death of Wells, *ad valorem* taxes on the property were paid by Morris Schuman's brother, for which he was reimbursed by Morris Schuman (T. 101 *et seq.*). Morris Schuman, however, because of his own serious illness, was not able to devote any attention to the status of the property (T. 7, 83-84).

Morris Schuman died testate on March 1, 1948. After his death, J. J. Schuman, acting on the assumption that title to all of the property acquired by the joint venture was still in his name, visited the executor of the Wells estate in order to "straighten up" the disposition of this property in a manner which would be equitable to both estates (T. 87, 219). The executor of the Wells estate told J. J. Schuman that the property would be divided after the note of January 21, 1941, was paid off (T. 87).

Upon discovery of the facts (T. 22), Petitioner instituted this action against Wells' heirs in the United States District Court for the Western District of Oklahoma, seeking a decree that Morris Schuman owned an undivided interest in the property in question, requesting an accounting by the Respondents, and requesting return of the ring pledged as security for the note of January 21, 1941 (T. 2-9). *The District Court found that Wells, at the time of his death, held title to property belonging to Morris Schuman acquired by him under circumstances constituting him a trustee for Schuman, which trust had never been repudiated (T. 23). It decreed that Petitioner was owner of an undivided one-half interest in the property in question and directed an accounting by the individual Respondents of all assets of the joint venture (T. 25); and also directed return of Morris Schuman's ring to Petitioner (T. 24-27). The Court specifically found that the circumstances justified the delay in instituting the action and that no person's rights had been prejudiced by the delay (T. 23). There was ample undisputed evidence available to the District Court on the basis of which a full reconstruction of events could be made (T. 80, 81, 165, 180, 189, 406, 409) and the*

District Court had no difficulty in learning the truth about the transactions in question. It rejected Respondent's contention that the Oklahoma statute of limitations barred the action, since in its view the statute would not commence to run until repudiation of the resulting trust (T. 23.).

On appeal, the Court of Appeals for the Tenth Circuit reversed the judgment of the District Court on the grounds that the action was barred by limitations and laches (App. 8). It held that the period of limitations under Oklahoma law was five years from the date the cause of action accrued (App. 8-9), and that the cause of action had accrued at the date of the death of Wells which had occurred six years prior to institution of the suit (App. 8-9). It held further that Petitioner's delay in instituting the action obscured the truth surrounding the transactions in controversy, warranting application of the doctrine of laches (App. 7). Notwithstanding its general reversal of the District Court on the ground that Petitioner's action was barred by limitations and laches, the Court below affirmed the judgment of the District Court to the extent that it directed return of Morris Schuman's diamond ring (App. 10). The opinion of the Court of Appeals was written by Judge Ritter, of the District Court of Utah, sitting by designation. Chief Judge Phillips concurred, and Judge Murrah concurred in the result (App. 10). A petition for rehearing was denied in a written opinion (App. 11-14).

REASONS FOR GRANTING THE WRIT

I

Respondents raised the question of laches for the very first time on appeal. It was not included in Re-

spondents' pleadings in the District Court (T. 19-20).

Rule 8(c), Federal Rules of Civil Procedure, provides that "in pleading to a preceding pleading, a party shall set forth *affirmatively* ... laches ... " (emphasis added); and Rule 12(h), Federal Rules of Civil Procedure, expressly provides that "a party waives all defenses and objections which he does not present either by motion ... or ... in his answer or reply. ..."

Decisions of the federal courts without deviation strongly affirm the vigorous application of these rules in holding that the defense of laches, if not pleaded, is waived, and may not be raised for the first time on appeal. *Tornello* v. *Deligiannis Brothers, Inc.,* 180 F. 2d 553 (C.A. 7); *Riley* v. *Titus,* 190 F. 2d 653 (C.A. D.C.), cert. den. 342 U.S 855, rehg. den. 342 U.S. 889; *Bergeron* v. *Mansour,* 152 F. 2d 27 (C.A. 1); *Callaway* v. *Hamilton National Bank of Washington,* 195 F. 2d 556 (C.A. D.C.); *Rank* v. *Krug,* 90 F. Supp. 773 (S.D. Cal.). The flavor of this line of cases is well illustrated by the language of the Court of Appeals for the First Circuit in *Bergeron* v *Mansour, supra*:

> "To assert the defense of laches one must plead that defense affirmatively in his answer * * *
>
> "The defendant neither pleaded nor brought in issue in the trial court the question of laches. He asserts, however, that the point has been properly raised for review on appeal. Notwithstanding his contentions to the contrary, we can find no evidence in the record or in the proceedings below of any assertion of this defense. The record unquestionably discloses considerable delay by the plaintiff in commencing her action after learning of the defendant's intention to plead the statute of limitations. But there is nothing to show to what

> such delay was attributable. 'If appellant desired to rely on this ground, it should have presented and preserved in the record evidence justifying the conclusion that culpable delay was attributable to appellee.' * * * The defendant had ample opportunity of which he did not see fit to avail himself, to amend his answer and include the defense of laches. * * * The question of laches not having been presented in any form to the trial court can not now be raised for the first time on appeal. * * *
>
> "It is the general rule that courts of review will not consider questions which have not been raised and tried in the trial court. * * *"

The decision of the Court below that laches barred Petitioner's action places it in direct conflict with these decisions, and with similar decisions involving failure to plead estoppel, which also must be affirmatively pleaded under Rule 8(c). See *Wackerle* v. *Pacific Employees Insurance Company,* 219 F. 2d 1 (C.A. 8); *Strouhal* v. *Allied Development Co.,* 220 F. 2d 541 (C.A. 10); *Cummings* v. *Moore,* 202 F. 2d 145 (C.A. 10). Indeed, the decision of the Court below is in direct conflict with its own recent decisions in *Strouhal* v. *Allied Development Co., supra,* and *Cummings* v. *Moore, supra.*

It is clear, moreover, that the identical rule applies under Oklahoma law, and that the defense of laches must be pleaded and cannot be raised for the first time on appeal. *Neff* v. *Calk,* 198 Okl. 379, 178 P. 2d 624.

The action of the Court below in reversing the District Court on the basis of the doctrine of laches, which was not pleaded in the trial court by Respondents as required by Rule 8(c), and under Rule 12(h) must

be regarded as waived, becomes even more astonishing[3] when consideration is given to the manner in which the Court below disposed of the laches question on its merits.

In its opinion reversing the District Court, the Court below based its holding that laches was applicable upon the following:

> "The events which brought about the action have become obscured by the passing of time. The truth surrounding the transactions in controversy cannot now be determined with any assurance. The evidence is seriously in conflict. It is extremely difficult to be sure that justice is being done. The only persons who knew the truth were dead at the time of the trial. The written contract between the partners was not produced at the trial. Ledger sheets and records concerning the most valuable tract of land in this suit could not be produced. One of the most serious disadvantages, and hence prejudice, from a long lapse of time is the loss of ability to prove the truth." (App. 7).

But the District Court which heard the witnesses and studied the evidence at first hand had no difficulty in reconstructing the circumstances and ascertaining the truth. Its findings of facts were supported not only by substantial evidence, but by the overwhelming weight of the evidence. No evidence was produced by Respondents establishing that any record necessary to a complete accounting was unavailable. The Court below arbitrarily rejected the findings of fact of the District

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[3] It is also astonishing that the Court below, notwithstanding its conclusion that Petitioner's "claim is stale and, in any event, is barred" (App. 6), affirmed the District Court's judgment in part in directing the return of Morris Schuman's ring (App. 10).

Judge. It did so on the basis of a "dead" record which did not raise the question of laches.

The best illustration of the arbitrary nature of the decision of the Court below may be found in comparing the statement of the Court below that the doctrine of laches was applied because:

> "It is the prejudice caused by the delay in seeking relief after the action accrues which determines its [laches] application. ... Appellants are placed at a disadvantage in attempting to prove events obscured through lapse of time." (App. 13).

with the statement of the District Court that

> "No person's rights have been prejudiced by the delay in bringing action and the circumstances surrounding the transaction are found to justify the delay in its institution." (T. 23).

Just as the Court below ignored Rule 8(c) and Rule 12(h), Federal Rules of Civil Procedure, so also it ignored Rule 52(a), Federal Rules of Civil Procedure, and a long line of judicial precedents, including many of its own making, as to the proper role of a court of appeals in reviewing findings of fact by a district judge.

Rule 52(a) specifically provides that where an action is tried upon the facts without a jury, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The opinions of the Court below do not reflect any conclusion that the District Court's findings were "clearly erroneous"; nor do they reflect any

regard for the District Judge's special competence and opportunity to pass upon questions of fact because he has seen and heard the witnesses.

This Court has consistently maintained that findings of fact by a district court may be reversed only if they are "clearly erroneous." In *United States* v. *Yellow Cab Co.*, 338 U.S. 338, at 341, this Court stated, citing Rule 52(a), Federal Rules of Civil Procedure:

> "Findings as to the design, motive, and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them * * *
>
> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous' ".

Similarly, this Court stated in *Walling* v. *General Industries Co.*, 330 U.S. 545, at 550:

> "We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed. The Circuit Court of Appeals' rejection of these findings cannot rest on the conflicting testimony of petitioner's witnesses. The District Court heard the witnesses, and was the proper judge of their credibility."

See also *Besser Manufacturing Co.* v. *United States,* 343 U.S. 444; *United States* v. *Oregon State Medical Society,* 343 U.S. 326.

That the decision of the Court below is a flagrant departure from the sound principles of appellate review which it has itself enunciated in recent years is apparent upon review of its vigorous statements in other cases.

> "If from the established facts, reasonable men might draw different inferences, it is not within the province of this court to substitute its judgment for that of the trial court as to which inference should be drawn." *Widney* v. *United States,* 178 F. 2d 880, 884 (C.A. 10).

> "In the trial of a non-jury case, it is the province of the trial court to observe the witnesses while testifying, to judge their qualifications, to appraise their credibility, to determine the inferences from the facts established, and to resolve conflict in the evidence. The evidence and the inferences fairly to be drawn from it were sufficient to support the material findings of fact made by the trial court, and they are not plainly erroneous. Therefore they must stand on appeal." *United Brotherhood of Carpenters* v. *Sperry,* 170 F. 2d 863, 867 (C.A. 10).

The Federal Rules of Civil Procedure govern the procedure in the district courts in all civil cases. Rule 1, Federal Rules of Civil Procedure. They have the force and effect of statutes. *Canister Co.* v. *Leahy,* 182 F. 2d 510 (C.A. 3); *Winsor* v. *Daumit,* 179 F. 2d 475 (C.A. 7); *Winkelman* v. *General Motors Corporation,* 48 F. Supp. 504 (S.D.N.Y.); *Kuenzel* v. *Universal Carloading and Distributing Co.,* 29 F. Supp. 407 (E.D. Pa.); *Barrezueta* v. *Sword S.S. Line, Inc.,* 27 F. Supp.

935 (S.D.N.Y.). As stated in *Beasley* v. *United States*, 81 F. Supp. 518, 527 (E.D.S.C.):

> "Of course, the Court and all the parties are bound to follow the Rules of Civil Procedure just as they would be required to obey a statute."

See also *Canister Co.* v. *Leahy, supra; Barrezuta* v. *Sword S.S. Line, Inc., supra.* Since they establish the procedure under which justice is administered in the federal courts, there should be clarity and precision in their application. Corrosion of their purpose, looseness in their application—no matter how creeping and slight—should not be tolerated; and only this Court has the power to effect full and uniform adherence to their requirements.

II

The Court of Appeals held that under Oklahoma law a five year period of limitations applied, regardless of the particular theory upon which Petitioner's action was founded,[4] and that the cause of action accrued so as to commence the running of the limitations period upon the death of Wells. In reaching the conclusion that the statute of limitations commenced running upon the death of Wells, the Court of Appeals relied primarily upon decisions of the Supreme Court of California (App. 8).

The principle enunciated in the line of California decisions cited by the Court below is most succinctly

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[4] The Court below expressed uncertainty as to whether Petitioner's action was founded upon a breach of trust growing out of the partnership agreement or was for a partnership accounting (App. 8, 9).

stated in the third paragraph of the syllabus in the case of *Norton* v. *Bassett,* 154 Cal. 411, 97 Pac. 894, as brought to the attention of the Court below in Respondents brief on appeal, pp. 32-33.

> "Where one who has purchased property for the benefit of himself and others under an agreement that they shall share in the proceeds, and who has, therefore, become as to such property, a voluntary trustee, dies, and his title descends to his heir at law, the latter becomes an involuntary and not a voluntary trustee, and the statute of limitations, as to actions against him to establish and enforce the trust, commences to run at once, without any demand being made on him. . . ."

But whatever the law may be in California,[5] it is clear that this is not the law in Oklahoma. The Supreme Court of Oklahoma has consistently maintained that a cause of action does not arise until the repudiation of the trust, and it is only then that the statute of limitations commences to run. *Allen* v. *Garman,* 201 Okl. 146, 202 P. 2d 1073; *McGill* v. *McGill,* 189 Okl. 3, 113 P. 2d 826; *Leedy* v. *Ellis County Fair Association,* 188 Okl. 348, 110 P. 2d 1099; *Blunck* v. *Blunck,* 172 Okl. 255, 44 P. 2d 325; *Foster* v. *Wilkinson,* 96 Okl. 110, 220 Pac. 325. Nothing in any of these decisions suggests that a different rule would be applied where legal title passes from an original "voluntary" trustee before there has been a repudiation. Indeed, there are decisions of the Supreme Court of Okahoma involving this factual situation in which the general Oklahoma rule has been applied. See *McGill* v. *McGill,* 189 Okl.

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[5] There is, however, a recognized exception under California law of the principle announced in *Norton* v. *Bassett, supra, cf. Cohn* v. *Cohn,* 7 Cal. 2d 1, 59 P.2d 969, within which this case would clearly fall.

3, 113, P. 2d 826; *Foster* v. *Wilkinson,* 96 Okl. 110, 220 Pac. 325.[6]

The question whether or not the Court below correctly applied Oklahoma law in this case may, in the context of this case, not be one of overwhelming importance in and of itself. But there is an important question. The issue is whether a Court of Appeals may disregard clearly formulated principles of applicable

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[6] The only Oklahoma decision relied upon by the Court below as authority for the proposition that limitations commence running upon death of a trustee or a partner who holds title to property is *Swartz* v. *Dennis,* 208 Okl. 334, 255 P.2d 923. But this case was decided on the basis of laches, and the court's discussion of limitations was gratuitous. Moreover, in considering the question of limitations in this case, the court was concerned only with ascertaining which particular statute of limitations applied, and was not concerned with *when* the statute commenced to run, although it did say in passing and without full consideration that the statute started running upon death of the partner holding title to the partnership property.

The facts in this case, furthermore, clearly preclude reliance upon *Swartz* v. *Dennis* as authority for the proposition that the cause of action accrues upon the death of the partner holding title to partnership property. One of the plaintiffs in that case was the brother (himself a partner) of the deceased partner, and as administrator of his brother's estate had 12 years before the action was instituted listed the partnership property as property of the deceased partner's estate. The other plaintiff, the widow of another partner, was found to be not a proper party to the action.

It would appear that the correct rule under Oklahoma law as to when the period of limitations starts to run where a partner holding title to partnership property dies is that stated in *Foster* v. *Wilkinson, supra.* In that case, the Supreme Court of Oklahoma held that the statute of limitations did not commence running upon the death of a partner holding title for purposes of liquidating partnership property when the partnership terminated, but rather upon liquidation of the property by the administrator of his estate.

state law and reject out of hand well considered legal conclusions of a district judge thoroughly experienced in the laws of his state.[7]

In this case the decision of the District Judge for the Western District of Oklahoma, who has first-hand experience in Oklahoma law, was rejected, almost summarily, by the Court of Appeals for the Tenth Circuit obviously less experienced in and knowledgeable concerning Oklahoma law. The opinion of the Court below on this question was based upon the flimsiest reference to pertinent decisions of the Supreme Court of Oklahoma and relied primarily upon irrelevant authority of other jurisdictions.

We believe that this case demonstrates the necessity on occasion for intervention by this Court in federal court cases involving the application of state law so as to serve notice that slipshod application or flagrant misapplication of state law will not be tolerated.

III

Subsequent to the decision of the Court below reversing the judgment of the District Court, the District Judge had occasion, in the course of further proceedings in this case[8] to express his opinion of the manner in which the Court of Appeals for the Tenth Circuit disposed of this case on appeal. The full text of these proceedings is set out as Appendix E, *infra*.

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[7] Judge Ritter, who wrote the opinion of the Court below, is District Judge of the District Court of Utah sitting by designation in this case. Judge Murrah, a former District Judge in Oklahoma, had special experience in Oklahoma law, and he concurred only in the result. (App. 10)

[8] On motion to spread the opinion of the Court of Appeals of record in the District Court.

Judge Chandler's remarks demonstrate that the serious deficiencies in this case stem directly from the failure of the Court below to confine itself within the proper scope of appellate review. They serve also as a reminder of the sound principle that courts of appeal should afford great respect and deference to the conclusions of district courts on questions of state law, because of their far greater familiarity with and experience in applying state law.

Two questions are presented in this petition. One is a question of federal law under the Federal Rules of Civil Procedure with respect to the failure to plead and the consequent waiver of the defense of laches. The other question is whether state law was correctly applied with respect to limitations. Both questions have their genesis in the fact that the Court below failed to follow the accepted course of judicial proceedings. The Court below has at one and the same time handled important questions of federal practice and procedure in a manner which conflicts with decisions of other courts of appeal, as well as with its own decisions, and has also decided an important state question in a manner which conflicts with applicable state law. Basic principles have been capriciously ignored and abused, thereby thwarting Petitioner in his effort to enforce his legal rights. This Court should not acquiesce in such a flagrant departure from the accepted course of proceedings in the federal courts.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the District Court

MEMORANDUM

In 1939, Charles E. Wells and Morris Schuman entered into an agreement to purchase properties at tax sales in the name of J. J. Schuman, son of Morris Schuman, and to divide equally the profits from the sale of the properties.

Wells agreed to and did advance the necessary funds and took a note therefor executed by Morris Schuman and J. J. Schuman. A diamond ring was pledged by the Schumans to secure the note.

The written contract of partnership has not been produced but Wells' secretary, who handled this transaction with him, testified that such a written contract of partnership was executed and the court so finds.

From 1940 to September 12, 1945, detailed reports were periodically made by Wells to Schuman showing the status of the accounts between them.

In 1941 Wells used one of the deeds which J. J. Schuman and wife had signed in blank and sent to him for use in selling partnership property to third persons, to convey the partnership property involved herein to himself. He gave no notice at any time of this fact to either of the Schumans and did not record the deed until May 18, 1942, although it is dated July 19, 1941. Thereafter Wells continued to make statements to Morris Schuman showing the status of the partnership accounts.

After Wells' death in 1946, although the full amount of the note and interest had been paid, the partnership property was listed as assets of his estate and distributed to his heirs. The administrator of Wells' estate testified that the property was probated without knowledge that Schuman owned an interest therein. The Schumans at all times be-

lieved that title to the property was in J. J. Schuman, and paid the taxes thereon.

Upon discovery of the facts, Schuman's administrator brought this action to recover the property. Wells' heirs contend that without knowledge of the trust the property has been distributed to them as heirs and that this action is barred by laches and limitation.

The Court concludes that Wells at the time of his death held title to property belonging to Schuman which had been acquired by him under circumstances constituting him a trustee for Schuman. There has never been a repudiation of the trust created by the unauthorized transfer of title by Wells to himself. No person's rights have been prejudiced by delay in bringing action and the circumstances surrounding the transaction are found to justify the delay in its institution. Nor is the action barred by statute since no statute would begin to run until actual notice of an unauthorized use of the deed and a repudiation of the resulting trust arising therefrom. Defendants must, therefore, account to plaintiff.

Under such circumstances it is unnecessary to determine whether Wells' heirs or the administrator of his estate were cognizant of facts which would create a resulting trust in their present title.

Dated this 30th day of September, 1953.

STEPHEN S. CHANDLER, JR.,
United States District Judge.

September 30, 1953

Messrs. Milsten, Milsten, Johnston & Morehead, 803 Palace Building, Tulsa, Oklahoma; Messrs. Twyford, Smith & Crowe, City National Building, Oklahoma City, Oklahoma; Messrs. Embry, Johnson, Crowe, Tolbert & Boxley, 640 First National Building, Oklahoma City, Oklahoma.

Gentlemen: Re: No. 5428—Kaye vs. Bechler, et al. Enclosed find memorandum in the above case. This will constitute Findings of Fact and Conclusions of law. Counsel will kindly prepare Judgment and present for signature.

Very truly yours,

STEPHEN S. CHANDLER, JR.,
United States District Judge.

Enc. cc: Court Clerk.

APPENDIX B

Opinion of the Court Below

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

No. 4857—November Term, 1954.

LOUISE WELLS BECHLER, LOIS WELLS ROBINSON and LAVON WELLS WINTERRINGER, *Appellants*,

v.

M. W. KAYE, *Administrator*, with the Will Annexed of the Estate of Morris Schuman, deceased; and DAVON OIL COMPANY, a corporation, *Appellees*.

Appeal from the United States District Court for the Western District of Oklahoma.

[February 21, 1955.]

William J. Crowe, (James S. Twyford, Solon W. Smith) for Appellants.

O. C. Essman and Travis I. Milsten (Harvey C. Carpenter, T. R. Benedum, David R. Milsten, James D. Johnston, Jacob L. Morehead) for Appellees.

Before PHILLIPS, Chief Judge, MURRAH, Circuit Judge, and RITTER, District Judge.

RITTER, District Judge.

Plaintiff, Kaye, Administrator of the estate of Morris Schuman, commenced this action in the Western District of Oklahoma against the heirs of Charles E. Wells, deceased, for the purpose of impressing a trust upon certain Oklahoma real property and for an accounting. The trial court determined the issues in favor of the plaintiff and defendants appeal.

Plaintiff claims that in 1939 Charles E. Wells and Morris Schuman entered into an agreement to purchase properties at tax sales and to divide equally all profits derived from their disposition. Parol evidence was introduced tending to show the existence and purported loss of the written agreement. The trial court found that the contract was in writing.

The testimony was to the effect that title to all property acquired was to be taken in the name of J. J. Schuman, the son of Morris Schuman, who was to act as trustee for Wells and Morris Schuman. Having had extensive experience in acquiring tax properties, Morris Schuman inspected, approved and selected the property interests. Wells, an attorney, received and collected all rentals and sales prices for property leased and sold, prepared all necessary instruments in reference to properties acquired and handled all books, records and accounts.

Wells agreed to advance the necessary funds to carry out the purposes of the partnership, taking a note from Morris and J. J. Schuman on January 2, 1941, for advances made by him to that date. As partial security for payment of the note, Morris Schuman pledged a diamond ring. The trial court found the note had been paid in full, and entered judgment for the return of the pledge. This portion of the judgment we affirm.

The complaint alleges that about July 19, 1941, J. J. Schuman became seriously ill and alleges because his survival was doubtful, Morris Schuman directed him to execute and deliver to Wells, as grantee, a quit-claim deed to certain partnership property and Wells agreed to hold the legal title as trustee for the benefit of the partnership. The trial court found that Wells filled in the description of the property with himself as grantee on a signed blank deed furnished by J. J. Schuman, without giving notice thereof to the Schumans.

Wells died testate July 14, 1946. Part of the property described in this deed, and specifically described in the complaint was included in the inventory of his estate and distributed to Appellants, daughters of Wells.

Plaintiff Morris Schuman died testate on March 1, 1948, and Kaye was appointed Administrator of his estate.

The suit seeks to impress a trust upon the property conveyed and an accounting of all rents and profits, together with a share in the royalties from an oil and gas lease on a parcel of the property from Davon Oil Corporation, also a party defendant.

Defendants claim beneficial ownership of the property, and that it was conveyed in settlement of a claim of Wells against the Schumans.

The trial court held that the transfer of the property to Wells was accomplished "under circumstances constituting him a trustee for Schuman" and therefore Appellants were under legal obligation to account to Appellee. It is unnecessary for us to pass upon this question because the claim is stale and, in any event, is barred.

Oklahoma substantive law controls this case.[1] And, this is also true of the defenses of laches and limitation.[2]

Appellants assert both limitations and laches. To the defense of laches the trial court held that "no person's rights have been prejudiced by delay in bringing action" and further stated: "Nor is the action barred by statute since no statute would begin to run until actual notice of an unauthorized use of the deed and a repudiation of the resulting trust arising therefrom.

We are unable to agree with these conclusions.

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[1] Title 28, U.S.C.A., Sec. 1652; Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[2] Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Hartford Accident & Indemnity Co. v. City of Sulphur, 123 F. 2d 566 (CCA-10, 1941).

There is no arbitrary rule for determining when a cause of action becomes stale. Delay alone is not laches; it must be a delay which works injury, prejudice or disadvantage to the defendant. In the final analysis each case must be determined upon its own circumstances and whether or not the doctrine of laches should be applied will be determined from the equities as shown by the evidence.[3]

The record in this case shows that five years had elapsed from the date of the deed before Wells' death; it was almost two years more before Morris Schuman died, and four years beyond that before this suit was brought. A total of eleven years passed between the date of the deed in question and the filing of this suit. Morris Schuman outlived Wells a year and nine months. On several occasions he talked to Wells' executor and never mentioned any claim to an interest in the property. All of the property in question was listed in the final decree in the Wells estate and in the estate tax return. There is no evidence inconsistent with the theory of a settlement between Wells and the Schumans. The events which brought about the action have become obscured by the passing of time. The truth surrounding the transactions in controversy cannot now be determined with any assurance. The evidence is seriously in conflict. It is extremely difficult to be sure that justice is being done. The only persons who knew the truth were dead at the time of the trial. The written contract between the partners was not produced at the trial. Ledger sheets and records concerning the most valuable tract of land in this suit could not be produced. One of the most serious disadvantages, and hence prejudice, from a long lapse of time is the loss of ability to prove the truth.

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[3] Stallings v. White, 194 Okl. 649, 153 P. 2d 813 (1944); Luschen v. Stanton, 192 Okl. 454, 137 P. 2d 567, 572 (1943); Dardenne v. Daniels, 176 Okl. 557, 56 P. 2d 293 (1936); Parks v. Classen Co., 156 Okl. 43, 9 P. 2d 432 (1932); Cassidy v. Gould, 86 Okl. 217, 208 P. 780 (1922); Morris v. Ross, 58 N.M. 379, 271 P. 2d 823 (1954).

The statute of limitations began to run at the time of Wells' death. No cause of action arose or could have arisen during Wells' lifetime unless he repudiated the trust, because it was voluntary and continuing. However, upon his death Appellants became trustees by operation of law through the devolution to them of title to the partnership property. This is, of course, upon the assumption that plaintiff is correct in his claim that there was a trust. Hence the cause of action accrued immediately upon the death of Wells, and no repudiation of the trust by Appellants was necessary to start the statute in motion.[4]

In our view of the case it doesn't make any difference whether the statute of limitations or the doctrine of laches applies. The suit is barred in either event. The nature of the cause of action determines the applicable statute of limitations. When Appellee first commenced this suit (taking the view most favorable to him) it was founded upon the breach of fiduciary relationship growing out of the partnership agreement. Oklahoma considers this an action for relief "not hereinbefore provided for" and a five-year statute of limitations applies.[5] Six years elapsed after Wells' death before this suit was brought. Therefore under Appellee's original theory as to the nature of the action, it is barred by the five-year statute of limitations.

However, the primary nature of Appellee's cause of action was changed by the trial court's ruling on the amendment of the pleadings to conform to the proof. A careful examination of the record shows that the action, by amendment, became one primarily for a complete partnership or joint adventure accounting of all property, real

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[4] Norton v. Bassett, 154 Cal. 411, 97 P. 894 (1908); Benoist v. Benoist, 178 Cal. 234, 172 P. 1109 (1918); Barritt v. Barritt, 132 Cal. App. 538, 23 P. 2d 54 (1933); Steinberger v. Steinberger, 60 Cal. App. 2d 116, 140 P. 2d 31 (1943); Allen v. Burlingame, 165 Kan. 294, 194 P. 2d 913 (1948).

[5] Title 12, O.S. 1951, Sec. 95 (6). Cassidy v. Gould, 86 Okl. 217, 208 P. 780 (1922); Royer v. Dobbins, 111 Okl. 156, 239 P. 157 (1925); Allen v. Garman, 201 Okl. 146, 202 P. 2d 1073 (1949).

or personal, in the hands of Wells from the date of the partnership agreement until his death.

Under the law of Oklahoma where an action is primarily for a partnership accounting in which title to realty belonging to the partnership stands in the name of one partner, it is considered an action on the contract of partnership itself, and the five or three-year statute of limitations controls, depending on whether the contract was written or oral.[6] In this case the agreement was in writing, thus falling under the five-year bar. The cause of action in such cases accrues upon the death of a partner, absent an earlier date.[7] Accordingly, upon the death of Wells the statute commenced to run and the six-year lapse before filing this suit is a complete bar to the action.

Historically, the statute of limitations was construed originally not to apply to suits in equity. Court of equity applied it by analogy, it was said. Today statutes provide for a single form of action which in Oklahoma is called a "civil action".[8]

The statutes of limitations in the Oklahoma Code expressly govern all "civil actions".[9] So, perhaps, by force of the statute, limitations are as much applicable in equity as in law. At any rate, in suits of equitable cognizance the courts of Oklahoma have applied the statute of limitations either with or without consideration of laches.[10]

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[6] Title 12, O.S. 1951, Sec. 95 (1)(2); Swartz v. Dennis, 208 Okl. 334, 255 P. 2d 923 (1952); Wolfe v. North, 182 Okl. 520, 78 P. 2d 674 (1938).

[7] Swartz v. Dennis, supra.

[8] Title 12, O.S. 1951, Sec. 10, provides: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action."

[9] Title 12, O.S. 1951, Sec. 92, provides: "Civil actions can only be commenced within the periods prescribed in this Article * * *"

[10] A recent decision is Swartz v. Dennis, supra. See also, Cassidy v. Gould, supra; Wolfe v. North, supra; Royer v. Dobbins, supra; Allen v. Garman, supra; Neff v. Calk, 198 Okl. 379, 178 P. 2d 624 (1947); Burckhalter v. Vann, 59 Okl. 114, 157 P. 1148 (1916).

Likewise other jurisdictions apply the statute of limitations to cases equitable in nature.[11]

Be that as it may, in any view of the case, the claim of plaintiff is barred. And, therefore, the judgment is reversed, except as to the return of the pledged ring.

Judge Phillips concurs.

Judge Murrah concurs in the result.

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[11] For example, see Hotchkin v. McNaught-Collins Improvement Co., 102 Wash. 161, 172 P. 864 (1918); Moss v. Moss, 20 Cal. 2d 640, 128 P. 2d 526, 529, (1942). In Roos v. Texas Co., 126 F. 2d 767 (CCA-5; 1942), the court said: "That statutes of limitation are applicable to equitable causes in Texas is clear. Texas has a blended system of jurisprudence, the same court administering both legal and equitable causes, and it has long been settled that the statutes of limitation of the state are 'equally applicable, whether the relief sought be legal or equitable.'" See also 34 Am. Jur. Secs. 58, 59, pp. 54, 55, and the footnote cases cited.

APPENDIX C

Opinion of the Court Below Denying Rehearing

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 4857—November Term, 1954.

LOUISE WELLS BECHLER, LOIS WELLS ROBINSON, and LAVON WELLS WINTERRINGER, *Appellants*,

v.

M. W. KAYE, *Administrator*, with the Will Annexed of the Estate of Morris Schuman, Deceased, and DAVON OIL COMPANY, a corporation, *Appellees*.

Opinion upon Petition for Rehearing.

[April 13, 1955.]

Before PHILLIPS, Chief Judge, MURRAH, Circuit Judge, and RITTER, District Judge.

RITTER, District Judge.

In his Petition for Rehearing Appellee argues that the Schumans had no cause of action to recover a half interest in the property in question, and, therefore, the statute of limitations did not commence to run, until the note was fully paid. This is for the reason, they claim, that the property, in addition to the pledged ring, was transferred to Wells as security for the payment of the note. Appellee's position is based on the rule set forth in Cohn v. Cohn, (Cal., 1936) 59 P. 2d 969, 973, which states: "But where decedent held legal title as security and the debt remained unpaid at his death, there is no immediate duty to transfer the property, and in such cases the statute is not set in motion by the death of the holder of the legal title."

The rule of the Cohn case applies only if the real property Appellee now seeks was transferred to Wells as security for the payment of the note and the note was unpaid at Wells' death.

In our opinion the rule of Cohn v. Cohn is inapplicable here for two reasons.

I. The Cohn rule is inapplicable in this case because the property in question was not transferred to Wells at the time of the execution of the note when the ring was pledged, but was transferred at later dates, and not at all as security for the payment of the note. The reason for the transfer is contained in the trial court's finding (Tr. 22) which states:

"In 1941 Wells used one of the deeds which J. J. Schuman and wife had signed in blank and sent to him for use in selling partnership property to third persons, to convey the partnership property involved herein to himself. He gave no notice at any time of this fact to either of the Schumans * * * ."

The finding does not disclose any intention of the parties to hold the property as a security. In fact, the Schumans had no notice at all of the transfer and therefore could not have intended the transfer as security for a debt. The evidence on this point is somewhat in conflict, but the finding is clearly supported by the evidence. In a prior finding (Tr. 22) the trial court states:

"A diamond ring was pledged by the Schumans to secure the note."

If the Cohn rule applies in this case it is limited to the ring alone, the sole security, and in that regard Appellee has received an affirmance of the lower court's judgment.

II. All references in the Petition for Rehearing to facts inconsistent with a settlement between Wells and the Schumans are to events which occurred sometime prior to Wells' death when the partnership was functioning. How-

ever, there is nothing inconsistent with the theory of a settlement near the date of Wells' death under the facts appearing thereafter. These facts show: (1) Morris Schuman outlived Wells one year and nine months, was in Shawnee on several occasions after Wells' death, talked with the executor of Wells' estate and never mentioned the properties. (Tr. 141, 146, 147, 148); (2) All of the properties were listed in Wells' inventory and in the final decree (Tr. 139) and in his estate tax return. (Tr. 141); (3) J. J. Schuman went to Shawnee after Morris Schuman's death and talked with the executor of Wells' estate and never mentioned the property in issue. (Tr. 86, 87); (4) J. J. Schuman filed an action in an Oklahoma State court against the Wells estate on August 31, 1948, (Tr. 151) to recover property listed in the deed of July 19, 1941, (Tr. 152) and stated that he was fully cognizant of all the facts in this case in 1948 when the state court action was filed, had discussed the entire matter with his mother at that time, and the properties in question here were not mentioned nor was a demand made until the present action was filed April 17, 1952, almost four years later. (Tr. 206, 207); (5) Morris Schuman knew the facts in this case before he died (Tr. 207) and never mentioned the properties in question before his death.

Such facts indicate a settlement and in that event the note would have been fully discharged.

Appellee based the Petition for Rehearing on the ground that the statute of limitations had not expired when the action was filed in 1952. However, the equitable bar of laches is also present in this case. It is the prejudice caused by the delay in seeking relief after the action accrues which determines its application. Here there is great conflict in the evidence and much of the truth surrounding the controversy cannot be determined at this time with any degree of assurance. Appellants are placed at a disadvantage in attempting to prove events obscured through lapse of time.

Petitioner's claim that the court found the note was paid after Wells' death is so fallacious as to require no comment. Ordinary principles of grammar teach that the clause, "After Wells' death in 1946", in the court's sentence has no reference to payment of the note.

Rehearing denied.

APPENDIX D

Oklahoma Statutes of Limitations

Section 93 of Title 12, Oklahoma Statutes Annotated, provides insofar as relevant:

> "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter;
>
> "• • • •
>
> "(4) An action for the recovery of real property not hereinbefore provided for, within fifteen (15) years."

Section 95 of Title 12, Oklahoma Statutes Annotated, provides insofar as relevant:

> "Civil actions, other than for recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> "*First.* Within five years: An action upon any contract, agreement or promise in writing.
>
> "• • • •
>
> "*Seventh.* An action for relief, not hereinbefore provided for, can only be brought within five years after the cause of action shall have accrued."

APPENDIX E

Transcript of Proceedings in the District Court on Respondent's Motion to Spread the Opinion of the Court of Appeals of Record in the District Court

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 5428-Civil.

M. W. KAYE, ET AL., *Plaintiffs,*

VS.

LOUISE WELLS BECHLER, ET AL., *Defendants.*

Before: The Honorable Stephen S. Chandler, Jr., United States District Judge for the Western District of Oklahoma.

Reporter s Transcript of Proceedings

In the United States Courthouse and Post Office Building, Oklahoma City, Oklahoma, May 3, 1955.

Appearances:

For the Plaintiff: Mr. Travis I. Milsten, Attorney, Palace Building, Tulsa, Oklahoma; and T. R. Benedum, Attorney, Norman, Oklahoma.

For the Defendant: Mr. James S. Twyford and Mr. William J. Crowe, Attorneys, Tradesmen National Building, Oklahoma City, Oklahoma.

PROCEEDINGS

The Court: Mr. Milsten, you were out a minute ago when I called your case. Can you take that up now?

Mr. Milsten: Yes, sir.

The Court: Now is there any reason why judgment shouldn't be entered now?

Mr. Crowe: I don't know of any. Now if they have any . . .

Mr. Benedum: If the Court please, when this case came down from the Circuit Court, we filed a petition for a re-hearing and the Court took that under advisement for about four or five weeks, as I recall, and the Court wrote an opinion denying the petition for re-hearing.

The Court: I haven't seen that.

Mr. Benedum: We saw it only on April 26th and immediately filed an application or motion to recall the mandate. Now we filed the motion to recall the mandate within four or five days after we received the opinion denying the petition for re-hearing. We think it would be premature at this time to spread the mandate of record or make any order at all in this court because we want the Court to know that if this case is finally sustained under the present order of the Circuit Court that we will file a petition . . .

The Court: Do you have some application pending for relief in the Court of Appeals?

Mr. Benedum: Yes, sir.

The Court: Then I couldn't enter the judgment.

In this case, I don't know whether it is called to anybody's attention or not, this is an opinion by Judge Ritter, and I feel obligated to call this to your attention if nobody has noticed it. Have you got it right there?

The Clerk: We don't have the opinion.

The Court: I would like to read a sentence from the opinion.

The Clerk: We don't get the opinion until . . . .

The Court: The first sentence in the opinion, I think, says, it is alleged in the petition or complaint a certain thing and the case is decided on that and at the trial it was not tried on that issue. All of the evidence showed that that was not true and that the allegation was in-

correct, and here is the decision of the Court of Appeals that goes back and takes the pleadings, where the issues are not made up in this court but they are made up at pretrial and in each case the pleadings are conformed to the proof, and there, it seems to me, the case is fully decided by the Court of Appeals based on a statement in the petition which is not substantiated by the evidence, and at the trial the defendant defended on the ground that that wasn't true and the plaintiff admitted it, and I think that should be called to their attention.

A trial judge is in a position where he can't say anything as a rule when a case is reversed and I never have. I believe it is the first time I have ever made a statement in twelve years about any case of mine on appeal. But there in the first sentence and all through the opinion the case is reversed on an allegation in a complaint which has nothing whatever to do with the lawsuit and which the defendant denied and the plaintiff admitted wasn't the fact and the Court found wasn't under all the evidence and there is no evidence to sustain it.

Now that's my impression about it and that should be called to the attention of the Court of Appeals if it is still pending up there. I think it may be not any of my duty to call it to anybody's attention and, as I say, I never have and I am not, by making this statement, intending to indicate that counsel are incompetent, but I was a little surprised by reference to a pleading and basing a decision on it and I think there must be some error some way that caused that which wasn't called to Judge Ritter's attention or he wouldn't have said that.

Mr. Crowe: If Your Honor please, regardless of that, if that were the fact, that still doesn't dispose of the question of limitations and laches, both of which the Court said applied. It is barred by limitations and barred by laches.

The Court: It may be. I am not trying at this late date to place my judgment above theirs and it is very likely that the memorandum that has come down, copy of which has not been sent to me and which as a rule comes at once on the motion for re-hearing, I haven't seen that, and it is possible that it is entirely disposed of there, and I have no fault to find with the decision and I am inclined to believe that it is far too late to do anything about it.

Mr. Crowe: Here are the facts, Your Honor, there is no application for relief in the Circuit Court of Appeals. The application is there stating that they are going to appeal to the Supreme Court of the United States and they ask that the mandate be recalled. Now there is no question about the fact that judgment in this court would not stay an appeal to the United States Supreme Court if they want to take it.

The Court: I think I better wait until . . . . I may already be in trouble with just what I have said here with the Court of Appeals. I don't think so. I think they will accept it in the spirit in which I have made it. But if there is such a thing up there, it ought to be passed on right away and I am ready and very nearly signed your judgment the other day. I have no inclination to delay anything.

Mr. Crowe: They can't recall the mandate, Your Honor, until some bond is put up to protect us, you know, and interest is accumulating at the rate of $100.00 a month and we have got a judgment here for costs of over a thousand dollars and no protection at all on behalf of anybody and they are not going to recall this mandate until some bond is executed.

The Court: Yes, just as soon as that is passed on, I will take it up. Just call it to my attention and I will be here every day except on next Thursday.

Mr. Milstein: Your Honor, please may it be set on notice so we will have an opportunity to be present, sir?

The Court: Yes, you can come over here any day, I take it. When you get ready to come up, call him on the phone and tell him you will appear, or you can call Mr. Benedum. You can come any day easier than he can, Mr. Benedum, and I will take it up. I just want to be sure everybody is accorded what they are entitled to.

(End of Proceedings.)

. . . . . .

FILED
JUL 29 1955
HAROLD B. WILLEY, C

No. 226

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

M. W. KAYE, Administrator, with the Will Annexed of the Estate of Morris Schuman, Deceased,
Petitioner,

VERSUS

LOUISE WELLS BECHLER, LOIS WELLS ROBINSON, LAVON WELLS WHITTENBURGER, and DAVON OIL COMPANY, a corporation,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JAMES S. TWITCHELL,
SOLON W. SMITH,
WILLIAM J. CROWE,
907 City National Building,
Oklahoma City 2, Oklahoma,
Attorneys for Respondents.

July, 1955.

STEINBACK TYPEWRITING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-6755

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Steinderger v. Steinderger, 60 Calif. App.2d 116, 140 P.2d 31	5
Swartz v. Dennis, 208 Okla. 334, 255 P.2d 923	5, 6
Winter v. Klein, 186 Okla. 74, 96 P.2d 83	4
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STATUTES:

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TEXTBOOKS AND MISCELLANEOUS:

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In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

M. W. KAYE, Administrator, with the Will Annexed of the Estate of Morris Schuman, Deceased,
Petitioner,

VERSUS

LOUISE WELLS BECHLER, LOIS WELLS ROBINSON, LAVON WELLS WINTERRINGER, and DAVON OIL COMPANY, a corporation,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW

There was no opinion written by the District Court. The opinion of the Circuit Court of Appeals is reported in 222 F.2d 216.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 21, 1955. The petition for rehearing was denied April 13, 1955.

Respondents submit that there is no ground for the invoking of the jurisdiction of this Court for the following reasons:

(a) There has been no question decided in conflict with the decision of another Court of Appeals.

(b) There has been no important state question decided in conflict with applicable state decisions.

(c) There has been no federal question decided herein.

QUESTIONS PRESENTED

The original action was for the establishment of a resulting trust, the enforcement thereof, accounting and to quiet title to real estate involved in such alleged trust. The questions are:

1. The sufficiency of the evidence to sustain the establishment of the trust. The Court of Appeals held the evidence insufficient.

2. The application of the statute of limitation. The Court of Appeals held the cause barred.

3. The application of the doctrine of laches. The Court of Appeals held the cause barred by laches.

STATUTE INVOLVED

The only statute involved is the Oklahoma limitation statute, Title 12, O.S.A., Sec. 95, subsections 1 and 2, which read:

"1. An action for the recovery of real property sold on execution, brought by the execution debtor,

his heirs, or any person claiming under him, by title acquired after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of the sale.

"2. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person; or the ward or his guardian, or any person claiming under any or either of them, by the title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale."

STATEMENT

The complaint alleged in substance that about 1939 Charles E. Wells and Morris Schuman purchased tax titles to certain lands in Oklahoma, taking the titles in the name of one Joe Schuman. That there was an agreement that Wells was to furnish the money for such purchases and when such properties were sold, Wells was to be reimbursed and the profits divided one-half to Wells and one-half to Schuman. That on July 19, 1941, because of the bad health of Joe Schuman, the properties described in the complaint were deeded to Wells under the same agreement. That Wells died on July 14, 1946, and the defendants succeeded to his interests. That Morris Schuman died on March 1, 1948, and plaintiff is his administrator. The suit was filed April 17, 1952, and seeks the establishment of a trust in the described real estate, an accounting and for the quieting of title.

The defendants answered, denying the allegations of the complaint and pleading limitation.

ARGUMENT

1.

The Court of Appeals held the evidence to be insufficient to establish the allegations of the complaint.

The opinion says:

> "* * * There is no evidence inconsistent with the theory of a settlement between Wells and the Schumans. The events which brought about the action have become obscured by the passing of time. The truth surrounding the transactions in controversy cannot now be determined with any assurance. The evidence is seriously in conflict. It is extremely difficult to be sure that justice is being done."

Thus, the evidence did not meet the standards required in such cases that the evidence must be of the most satisfactory kind—clear—unequivocal and decisive.

—*Fibikowshi* v. *Fibikowshi*, 190 Okla. 152, 121 P.2d 304;

Winter v. *Klein*, 186 Okla. 74, 96 P.2d 83;

Birdwell v. *Estes*, 189 Okla. 379, 116 P.2d 969;

Gaines Bros. Co. v. *Gaines*, 176 Okla. 576, 56 P.2d 869;

McCrory v. *Evans*, 192 Okla. 649, 138 P.2d 823.

2.

That the cause was barred by limitation is held in the following cases:

—*Swartz* v. *Dennis*, 208 Okla. 334, 255 P.2d 923;
Cassidy v. *Gould*, 86 Okla. 217, 208 Pac. 780;
Wolfe v. *North*, 182 Okla. 520, 78 P.2d 674;
Royer v. *Dobbins*, 111 Okla. 156, 239 Pac. 157;
Allen v. *Garman*, 201 Okla. 146, 202 P.2d 1073;
Neff v. *Calk*, 198 Okla. 379, 178 P.2d 624;
Burchhalter v. *Vann*, 59 Okla. 114, 157 Pac. 1148;
North v. *Bassett*, 154 Calif. 411, 97 Pac. 894;
Benoist v. *Benoist*, 178 Calif. 234, 172 Pac. 1109;
Barritt v. *Barritt*, 132 Calif. App. 538, 23 P.2d 54;
Steinderger v. *Steinderger*, 60 Calif. App.2d 116, 140 P.2d 31;
Allen v. *Burlingame*, 165 Kans. 294, 194 P.2d 913.

The case of *Swartz* v. *Dennis, supra,* is the latest expression of the Supreme Court of Oklahoma and is decisive of the issues herein. No other authority is necessary.

3.

That the cause was barred by laches was the third ground of decision.

It comes with poor grace from the petitioner to say that laches was not raised or presented in the trial court. *Such is not the fact.* Counsel for respondents have in their possession the typewritten briefs filed in the trial court. The matter of laches was briefed by both sides and fully

considered by the court. In the decision of the trial court (R. 22), laches was considered. The trial court repeatedly said during the course of the trial that the pleadings would be considered amended to conform to the proof. If such were not the case, petitioner would have been out of court at an early stage for his recovery is now sought on entirely different grounds than set forth in the complaint.

That laches applies is held by the following:

Swartz v. *Dennis*, 208 Okla. 334, 255 P.2d 923;
Cassidy v. *Gould*, 86 Okla. 217, 208 Pac. 780;
Baker v. *Deichman*, 185 Okla. 452, 94 P.2d 246;
Mason v. *McFadden* (Okla.), 298 Fed. 384;
30 C.J.S., p. 543.

CONCLUSION

The decision of the Court of Appeals is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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July, 1955.